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88-427

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARK B. HARMON, *et al.*,
Petitioners,

v.

RICHARD L. THORNBURGH, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Fourth Amendment to the United States Constitution prohibits the Attorney General of the United States from requiring employees of the Department of Justice to submit to warrantless seizures and chemical searches of their urine for evidence of drug use, where such seizures and searches are to be conducted in a random manner without any reason to believe that the employees being tested have used illegal drugs or that drug use is a problem in the Department of Justice, and the employees to be tested are not in positions directly affecting public safety or involving contact with illegal drugs.

PARTIES TO THE PROCEEDING

The plaintiffs in the district court (all of whom are petitioners here) were: Mark B. Harmon, Cynthia Alford, Daniel L. Bell II, Tressa J. Borland, Jo Brooks, Daniel Butler, David D. Buvinger, Kevin Callahan, Patricia G. Chick, Rebecca P. Dick, Karla Dobinski, Norajean M. Flanagan, Michael J. Gennaco, Albert S. Glenn, Elaine M. Gordon, Irv Gornstein, Lorna Grenadier, Nelson D. Hermilla, Bradley D. Jackson, Lisa Kahn, Christopher J. Kelly, Diane R. Kilbourne, Barry Kowalski, Louise A. Lerner, Gregory F. Linsin, Peter W. McCloskey, Marie K. McElderry, Mary Jean Moltenbrey, Eric W. Nagle, Kathleen B. Nalty, Leo D. Neshkes, David Orbuch, Criselda Ortiz, John R. Sawyer, Charles R. Schwidde, Deborah Sines, Isabelle M. Thabault, Linda F. Thome, Fred R. Wagner, Beneva Weintraub, Paula A. Wolff and William R. Yeomans. The defendants below were then-Attorney General Edwin Meese III and Assistant Attorney General for Administration Harry H. Flickinger, who were named in their official capacities only. Attorney General Richard L. Thornburgh has been substituted as a respondent here. *See* Fed. R. Civ. P. 25(d); Sup. Ct. R. 40.3.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mark B. Harmon and his fellow employees at the United States Department of Justice respectfully petition the Court to issue a writ of certiorari before judgment by the court of appeals to review the judgment of the United States District Court for the District of Columbia in this case.

OPINION BELOW

The opinion of the district court is not yet reported. It is reproduced in the Appendix to this petition at pages 1a-12a.

JURISDICTION

The final judgment of the district court granting a permanent injunction was entered on July 29, 1988. App. 15a. The defendants' notice of appeal was filed on

August 5, 1988, App. 19a, and the case was docketed in the court of appeals on August 11, 1988, as No. 88-5265. App. 21a.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e). 28 U.S.C. § 1254(1) authorizes this Court to issue a writ of certiorari to review any case that is "in" the court of appeals, either "before or after rendition of judgment or decree" by that court. A petition for such a writ may be filed "at any time before judgment," 28 U.S.C. § 2101(e), and may be filed by "any party" to the case, 28 U.S.C. § 1254(1), including the party that prevailed in the district court. *See, e.g., United States v. Nixon*, 418 U.S. 683, 686, 690 (1974). Because the appellate jurisdiction of the court of appeals has properly been invoked, *see* 28 U.S.C. § 1291 (authorizing appeals from final decisions of the district courts), and the appeal has been properly docketed, this Court has jurisdiction to issue a writ of certiorari before judgment in this case.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Executive Order No. 12,564, 51 Fed. Reg. 32,889 (1986), the "Department of Justice Drug-Free Workplace Plan," the "Department of Justice Drug Free Workplace Program for the Offices, Boards and Divisions" and excerpts from Appendix A thereto, and pertinent portions of the "Mandatory Guidelines for Federal

Workplace Drug Testing Programs," 53 Fed. Reg. 11,970 (1988), are reproduced in the Appendix to this petition at pages 24a to 89a and pages 102a to 108a.

STATEMENT OF THE CASE

A. The Administration's Random Urinalysis Program

In March 1986, the President's Commission on Organized Crime issued a report urging, *inter alia*, the use of "suitable drug testing programs" in all federal agencies as a means of "express[ing] the utter unacceptability of drug abuse" in society, and as a model for similar programs that the Commission hoped would be instituted by state and local governments and by private employers.[1] President Reagan responded on September 15, 1986, by issuing Executive Order No. 12,564, 51 Fed. Reg. 32,889 (1986), which authorizes the head of every federal agency to institute random or otherwise uniform urinalysis drug testing of employees in "sensitive positions." Any employee whose job involves law enforcement, the protection of life and property, public health or safety, access to classified material, or "a high degree of trust and confidence" is considered "sensitive" and may be designated for testing.[2] On May 3, 1988 the Administration informed Congress that 345,528 federal employees have been designated for random testing pursuant to the Executive Order and their respective agencies' plans.[3]

Scope of Testing. In the Department of Justice, the Attorney General and the Assistant Attorney General for Administration have issued a "Department of Justice Drug-Free Workplace Plan" (the "DOJ Plan") and a

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[1] President's Commission on Organized Crime, Report to the President and Attorney General, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, AND ORGANIZED CRIME 483 (March 1986).

[2] Executive Order 12,564, App. 26a, 31a-32a.

[3] Washington Post, May 4, 1988, at A1.

"Department of Justice Drug Free Workplace Program for Offices, Boards and Divisions" (the "OBD Plan"). The OBD Plan designates for random drug testing those employees in the Offices, Boards and Litigating Divisions who are authorized to have access to top secret information, who conduct or assist in grand jury proceedings, or "whose assigned position duties include the prosecution of criminal cases."[4] All employees in such positions must have their urine tested for evidence of drug use during their first year of employment, and, for the remainder of their careers, all such employees are continuously subject to random testing. On June 27, 1988 the Department notified employees in the Offices, Boards and Litigating Divisions in Washington, D.C., that random testing could begin as soon as 60 days thereafter,[5] and announced that approximately 1800 of the employees notified had been designated for testing.[6]

Under the DOJ Plan, the positions subject to mandatory and random testing include, *inter alia*:

• Attorneys, and executive and administrative staff assistants, in the Office of the Solicitor General, on the rationales that "it would be inconsistent with the mission of the office for its incumbents simultaneously to represent the United States before this nation's highest court while violating its criminal statutes," and that "[m]istakes caused through impaired judgment could prove extremely expensive to the . . . American taxpayer. For example, the loss of a liability lawsuit by the Government could establish dangerous precedent and cost the Government incalculable sums of money."[7]

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[4] OBD Plan, App. 73a.

[5] General Notice, June 27, 1988, App. 90a.

[6] Department of Justice Release, June 27, 1988, App. 98a.

[7] OBD Plan, Appendix A, App. 89a.

• Attorneys and secretaries in the Legal Policy Section of the Antitrust Division, on the grounds that "[d]ecisions and performance influenced or impaired by illegal drug use could result in inconsistent or poorly conceived policy development and implementation, failure to identify problems and recommend improvements in the way the Division accomplishes its mission, and lack of initiative to make legislative or management changes to improve overall effectiveness," and that "[d]rug usage could result in mishandling of grand jury, sensitive and classified materials . . . ." [8]

• Attorneys, law clerks, paralegals, secretaries and clerks in the Criminal Section of the Civil Rights Division, on the grounds that:

> "[i]llegal drug use could result in the failure to appropriately handle allegations of criminal misconduct. For example, bizarre allegations of criminal misconduct against public officials and private individuals continue to occur, *e.g.*, involuntary servitude/peonage of migrant workers. If these allegations had been received by an individual using illegal drugs, judgment may have impaired decision [sic] to forward for investigation and, ultimately, prosecution of this incident allowing for not only continued violations, but, possibly, increasing the number of individuals held involuntarily. Drug use could also jeopardize the level of secrecy required in grand jury preparation and presentation." [9]

• Attorneys, paralegals, and typing secretaries and clerks in the Environmental Crimes Section of the Land and Natural Resources Division, on the grounds that "if attorneys fail to vigorously carry out close investigations and prosecutions or to exercise sound judgment, serious felonies may escape detection and prosecution," and that "drug use by incumbents could result in the disclosure of

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[8] OBD Plan, Appendix A, App. 85a.

[9] OBD Plan, Appendix A, App. 86a.

the identities of confidential sources and informants who could be subject to physical harm." [10]

The government has admitted, however, that "the vast majority of Justice Department employees do not use drugs" and that "there is no reason to believe that drug use is widespread in the Department of Justice." [11] These admissions are corroborated by the experience of other federal agencies conducting drug testing of civilian employees, which have consistently had positive rates of substantially less than one percent.[12] Thus, the district court below observed, "[d]efendants concede that illegal drug use is not a problem in the Department of Justice." App. 6a.

Manner of Testing. The Department of Justice, like other agencies, will conduct its drug testing in accordance with the "Mandatory Guidelines for Federal Workplace Drug Testing Programs" issued by the Secretary of Health and Human Services on April 11, 1988, 53 Fed. Reg. 11,970 (1988), pertinent portions of which are reprinted in the Appendix. An employee will be notified on the same day and "preferably within two hours, of the scheduled testing," App. 56a, to report to a "collection site," where he or she must produce positive photo identification and surrender his or her outer garments, briefcases, purses, and similar items to a "collection site person." This government agent must accompany the employee into the restroom and remain there throughout the collection process. App. 103a-104a.

The employee must wash his or her hands before urinating, and must thereafter stay in the presence of the

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[10] OBD Plan, Appendix A, App. 87a-88a.

[11] *Department of Justice Drug Testing Program: What You Need to Know* at 9.

[12] Isikoff, *Drug Testing Ferrets Out Few Users*, Washington Post, July 19, 1988 at A17.

collection site person, who will deny him or her any further access to water fountains, faucets, soap dispensers or cleaning agents. Although an employee may urinate in a stall, the collection site person must observe and record any "unusual behavior or appearance" by the employee. App. 104a. The employee must hand the urine specimen directly to the collection site person, and only thereafter may the employee wash his or her hands. App. 105a. The collection site person must immediately—and in view of the employee—visually inspect the urine for normal coloration and for any signs of contaminants, and must measure its temperature. If the sample appears abnormal, or it is unacceptably cool or warm, or if there is any other reason to believe that an employee has attempted or may attempt to alter or substitute a specimen, the employee is required to provide a second urine sample as soon as possible under the "direct observation" of a collection site person. App. 105a-106a. If the employee does not produce at least 60 milliliters of urine on the first try, he or she is required to repeat the entire process until that amount of urine is obtained, and "may be given a reasonable amount of liquid to drink for this purpose." App. 105a. The sample or samples are then sealed, labeled, and packaged for mailing to a laboratory. App. 106a-108a.

The DOJ and OBD Plans recognize that positive test results may be the result of legitimate activities such as the use of prescription medication. *See* App. 58a. Accordingly, they provide for review of the results by a medical officer, who may be a Department employee or a private contractor. App. 39a-40a, 48a-49a, 58a, 72a. In order to avoid disciplinary action based on an apparently positive test result, an employee may have to disclose highly confidential medical information to this government agent, since the burden is on the employee to "justify" a positive test result. App. 58a. Further, if the medical officer does not accept the employee's ex-

planation and reports the positive result to the employee's supervisors, the employee may be forced to disclose these private medical matters to them, to other officials involved in the disciplinary process, and ultimately to the courts in an attempt to avoid discipline and discharge.

The district court here recognized that "the highly controlled environment and the elaborate procedure designed for obtaining urine samples of an apparently law-abiding employee outside the context of a routine medical examination may be considered offensive and demeaning" and that "other strong privacy interests are implicated in drug testing." App. 8a-9a.

Disciplinary Consequences. An employee who refuses to provide a urine sample upon demand is subject to discipline, including dismissal. App. 56a, 58a.

A single "verified" positive test result [13] is cause to find that an employee uses illegal drugs, and the Department "shall not allow an employee to remain on duty in a sensitive position after being found to use illegal drugs." App. 59a. An employee may be referred to a rehabilitation program after a first positive test, but disciplinary action will nevertheless be instituted and the employee can even be dismissed. App. 59a-60a. The positive results of a drug test may be disclosed to any Department officials authorized to take disciplinary action against the employee. App. 62a. An employee who refuses to enter a rehabilitation program or who tests positive a second time must be dismissed. App. 60a. These disciplinary consequences follow without regard to the nature of the employee's job performance.

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[13] Under the DOJ and OBD Plans, the Department would conduct drug testing using an initial immunoassay test, "verified" by a gas chromatography/mass spectrometry test. App. 41a. Considerable evidence was offered before the district court to show that these testing procedures can produce positive results that are due not to illegal drug use but to laboratory errors or use of legitimate substances. The district court did not address this issue.

B. The Proceedings in This Case

Plaintiffs filed this suit on June 28, 1988, the day after the Department of Justice notified its employees that in as soon as sixty days it would commence mandatory urinalysis drug testing for test-designated employees in "sensitive" positions. This testing would be on a random basis—that is, without any reason to suspect that any particular employee had used illegal drugs.

The plaintiffs, petitioners here, are Mark B. Harmon, a Trial Attorney in the Criminal Section of the Civil Rights Division, and forty-one other Justice Department lawyers, economists and paralegal employees who are subject to random urinalysis.[14] In their complaint, plaintiffs alleged that the Department of Justice's random drug testing program violated their rights under the Fourth Amendment and other constitutional and statutory provisions. Federal jurisdiction rested on 28 U.S.C. § 1331. Plaintiffs moved for a preliminary injunction, and the defendants filed a motion to dismiss, in part, and for summary judgment, in part. Both motions were heard by the district court (George H. Revercomb, J.) on July 28, 1988, and on July 29, that court granted plaintiffs' motion and issued a preliminary injunction.

The court agreed with the defendants' assertion "that drug abuse by federal employees is intolerable," App. 5a, but emphasized that, "[q]uite simply, the issue 'is not *whether* drug use, off-duty or on-duty is incompatible with federal employment. Rather, the question is *by what means* it is permissible to come by evidence of such drug use.'" *Id.*, quoting *AFGE v. Weinberger*, 651 F. Supp. 726, 735 (S.D. Ga. 1986) (emphasis in original). Turning to that issue, the court first held, as has every other

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[14] Petitioners are employed in the Antitrust Division, the Civil Division, the Civil Rights Division, the Criminal Division, and the Land and Natural Resources Division. Thirty-eight are attorneys and four hold other positions. *See* Complaint at ¶¶ 4-8.

court that has considered the matter, that compulsory urinalysis is a search and seizure that must be measured against the standards of the Fourth Amendment. App. 5a.

The court then held these random searches unconstitutional under the standards this Court has articulated in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) and *O'Connor v. Ortega*, 107 S.Ct. 1492 (1987). The court found that random drug testing could not be justified at its inception because, given defendants' concession "that illegal drug use is not a problem in the Department of Justice," it is "highly unlikely that compulsory random urinalysis drug testing of otherwise trusted and apparently law-abiding employees would turn up evidence of work-related drug use." App. 6a. Nor, the court ruled, could the searches be justified purely on a deterrence rationale, since "something more than unfounded fears must justify an intrusive search," App. 7a, and "there is no nexus between [the government's alleged interests of] fitness for duty, security and integrity on the one hand, and compulsory random urinalysis drug testing on the other, where no drug problem is believed to exist." App. 8a. Moreover, the court reasoned, "it is impossible to argue that mandatory random urinalysis drug testing serves the purpose of deterring illegal drug use by trusted and apparently law-abiding employees. In other words, defendants cannot claim a compelling governmental interest in deterring something that poses no threat and therefore does not need to be deterred." App. 10a.

The court rejected fitness for duty as a justification for random drug testing because, as the government had conceded, "urinalysis does not measure an employee's current impairment." App. 9a. The court also rejected as insufficient the government's asserted security and integrity interests, observing that "[m]any other conceivable forms of misconduct by plaintiffs *could* be harmful to the compelling governmental interests defendants assert. For example, an employee might embezzle, ob-

struct justice, or accept bribes. Such acts would clearly harm the integrity and public image of the government, yet no one could seriously argue that, absent any grounds to suspect misconduct, defendants would be justified in tapping that employee's telephone, censoring his mail or searching his home." App. 11a.[15]

On the same day that the court issued its decision, defendants made an oral motion for a stay pending appeal, which the court denied from the bench. Immediately thereafter, on defendants' unopposed oral motion, the court issued a permanent injunction prohibiting defendants "from implementing mandatory random drug testing by urinalysis in the Offices, Boards, and Litigating Divisions of the Department of Justice under the 'Department of Justice Drug-Free Workplace Plan.'" App. 13a, 15a.

The Department of Justice filed its notice of appeal on August 5, 1988, and on August 15 moved for expedited consideration of the appeal. The court of appeals has now established an expedited schedule, requiring that briefing be completed by November 28, 1988, and has scheduled oral argument for December 15, 1988.

REASONS FOR GRANTING THE WRIT

A grant of certiorari before judgment is unusual. This case, however, is also unusual, in that it would afford a far more apt vehicle to resolve the constitutionality of the numerous random drug testing programs that have been proposed or initiated throughout the United States than would the two drug testing cases that this Court has already agreed to hear. *See National Treasury Employees Union v. von Raab*, No. 86-1879, *cert. granted*, 108 S.Ct.

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[15] The district court did not reach plaintiffs' alternative claims for relief under the Fifth Amendment, the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and Section 101(a) of the Civil Service Reform Act of 1978, 5 U.S.C. § 2302(b)(10). Plaintiffs do not seek review of those claims in this Court.

1072 (Feb. 29, 1988); *Burnley v. Railway Labor Executive Association*, No. 87-1555, *cert. granted*, 108 S.Ct. 2033 (June 6, 1988). This Court has exercised the power to grant certiorari before judgment "not only in cases of great public emergency but also in situations where similar or identical issues of importance are already pending before the Court and where it is considered desirable to review simultaneously the questions posed in the case still pending in the court of appeals." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* at 43 (6th ed. 1986).[16]

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[16] It has been perhaps the most frequent function of the writ of certiorari before judgment to bring before the Court cases which present legal issues related to pending cases and that should be decided together with them. In *Porter v. Dicken*, 328 U.S. 252, 254 (1946), the Court explained that it was "prompted" to grant certiorari before judgment "by reason of the close relationship of the important question raised to the question presented in *Porter v. Lee*," 328 U.S. 246 (1946), which was already pending before the Court. The Court granted certiorari before judgment in *Taylor v. McElroy*, 360 U.S. 709 (1959), "because of the pendency here of *Greene v. McElroy*," 360 U.S. 474 (1959), which raised similar questions. *Taylor*, 360 U.S. at 710. And the Court granted certiorari before judgment in *Bolling v. Sharpe*, 344 U.S. 873 (1952), in order to consider that case together with *Brown v. Board of Education*, because "the effect of any decision which it [might] render in [*Brown* is] such that it would be well to consider, simultaneously, the constitutional issues posed in [*Bolling*]." *Brown v. Board of Education*, 344 U.S. 1, 3 (1952). *See also Wilson v. Bohlender*, 361 U.S. 281, 283 (1960) (certiorari before judgment granted while *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960), which raised similar legal questions, was pending on appeal); *Kinsella v. Krueger*, 354 U.S. 1, 5 (1957) (certiorari before judgment granted while *Reid v. Covert*, 354 U.S. 1 (1957), which raised similar legal questions, was pending on appeal); *Eastern Equities Corp. v. United States*, 282 U.S. 409, 415 n.2 (1931) (certiorari before judgment granted so that case could be heard together with other cases raising same question); *Royal Insurance Co. v. United States Shipping Board Merchant Fleet Corp.*, 280 U.S. 320, 324-25 (1930) (same); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 288 and n. 77 (6th ed. 1986).

This Court's Rule 18, which provides for issuance of a writ of certiorari before judgment "upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court," focuses in effect on three criteria: the public importance of the issue presented, the need for a ruling from this Court, and the immediacy of that need. This case satisfies each criterion, and fully justifies the unusual treatment of certiorari before judgment.

The Solicitor General already has characterized the legal issues surrounding urinalysis drug testing as "an area of the utmost public importance." *Burnley v. Railway Labor Executives' Association*, No. 87-1555, Petition for Certiorari at 17 (*cert. granted* June 6, 1988). And in moving the court of appeals to expedite the appeal of this case, the government averred that "[t]he public has a strong and unusual interest in the prompt disposition of this appeal." [17]

Petitioners agree, and would add only that the issues are not limited to the Department of Justice but extend throughout the federal government and to all levels of state and local government. The widespread, suspicionless searches and seizures of federal employees mandated by Executive Order 12,564 represent an unprecedented frontal assault on the personal privacy and bodily integrity that Americans have heretofore taken for granted as protected against government intrusion by the Fourth Amendment.

In addition to its constitutional significance, the question presented by this case is one of direct and immediate concern to nearly three hundred and fifty thousand federal government employees, and of indirect, but in many cases no less immediate, concern to many thousands of

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[17] Consent Motion to Expedite Consideration of the Appeal at 2, *Thornburgh v. Harmon*, No. 88-5265 (D.C. Cir. filed Aug. 15, 1988).

state and local government employees around the Nation. Executive Order 12,564 requires *every* federal agency to institute a program of suspicionless drug testing, and it proclaims its intention to "show the way" to all other public and private employers. App. 24a. Numerous state and local government agencies ranging from police departments to school boards have followed the administration's lead by instituting similar programs.[18]

As a result, the lower courts have been filled with cases challenging the legality of such drug testing plans. Six circuit courts of appeals have passed on their constitutionality in one form or another,[19] as have a multitude of district courts and state courts.[20] These decisions cannot

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[18] *See, e.g.*, cases cited in notes 19 and 20 *infra*.

[19] *See Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir.), *cert. denied*, 107 S.Ct. 577 (1986); *Policeman's Benevolent Association v. Township of Washington*, 850 F.2d 133 (3rd Cir. 1988); *National Treasury Employees Union v. von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 1072 (1988); *Lovvorn v. City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988); *Penny v. Kennedy*, 846 F.2d 1563 (6th Cir. 1988); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *Rushton v. Nebraska Public Power District*, 844 F.2d 562 (8th Cir. 1988); *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S.Ct. 2033 (1988); *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), *pet. for cert. pending*, No. 87-1706 (filed April 15, 1988).

[20] *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency*, 663 F. Supp. 1560 (C.D. Cal. 1987); *AFGE v. Dole*, 670 F. Supp. 445 (D.D.C.), *appeal docketed*, No. 87-5417 (D.C. Cir. Dec. 11, 1987); *AFGE v. Meese*, No. C-88-1419 SAW, —— F. Supp. —— (N.D. Cal. June 16, 1988); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D. N.J. 1986); *Mullholland v. Department of the Army*, 660 F. Supp. 1565 (E.D. Va. 1987); *NFFE v. Carlucci*, 680 F. Supp. 416 (D.D.C.), *appeal docketed*, No. 88-5080 (D.C. Cir. Mar. 16, 1983), permanent injunction issued and stayed, —— F. Supp. —— (D.D.C. July 6, 1988); *Taylor v. O'Grady*, 669 F. Supp. 1422 (N.D. Ill. 1987); *Patchogue-Medford Congress of Teachers v. Board of Education*, 70 N.Y.2d 57, 517 N.Y.S.2d 456, 510 N.E.2d 325 (1987); *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. 1985).

be reconciled with each other.[21] This Court has already recognized both the importance of the legal issues surrounding mandatory urinalysis programs, and the need for uniform nationwide guidance in resolving those issues, by granting writs of certiorari in *National Treasury Employees Union v. von Raab*, No. 86-1879 (cert. granted Feb. 29, 1988), and *Burnley v. Railway Labor Executives' Association*, No. 87-1555 (cert. granted June 6, 1988).

Unfortunately, neither of those cases affords an adequate opportunity to address the most serious issues presented by random drug testing in a manner that will effectively guide the lower courts. *Von Raab*, *Burnley* and this case all involve related issues of mandatory drug testing of public employees without particularized suspicion of drug use. Both pending cases, however, involve far more limited testing programs. *Burnley* involves post-accident testing of train crews, while *von Raab* involves testing which, while conducted without any evidence of a drug problem in the Customs Service, is only applied to employees seeking transfers to other positions, and not randomly to incumbent employees. Moreover, neither *Burnley* nor *von Raab* present a program of testing employees none of whom are directly responsible for public safety or directly involved in the interdiction of illegal drugs. As a result, the key constitutional questions posed by Executive Order 12,564, which are squarely presented by this case, may not even be reached in the

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[21] For example, Judge Hogan, in holding the Department of the Army's civilian employee drug testing program unconstitutional in *NFFE v. Carlucci*, 680 F. Supp. 416 (D.D.C. 1988), recognized that his decision was in conflict with Judge Gesell's prior opinion upholding the Department of Transportation drug testing program, *AFGE v. Dole*, 670 F. Supp. 445 (D.D.C. 1987). *NFFE v. Carlucci*, 680 F. Supp. at 418. Both decisions are currently on appeal to the D.C. Circuit. Similarly, in *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, the Sixth Circuit has squarely rejected the Third Circuit's application of the administrative search doctrine to random drug testing programs in *Shoemaker v. Handel*, 795 F.2d 1136.

Court's consideration of either of the pending cases.[22] Thus, the Court's disposition of *Burnley* and *von Raab* may not settle the issues upon which the lawfulness of most government employee drug testing around the country will turn, and upon which the constitutional rights of hundreds of thousands of government employees depend. In contrast, the Court's resolution of this case would also resolve, beyond any doubt, the constitutionality of most of the drug testing proposed to be carried out under Executive Order 12,564.

In asking the Court to grant certiorari in *Burnley* after it had already agreed to hear *von Raab*, the Solicitor General noted that *Burnley* "offer[ed] a very different perspective on drug and alcohol testing" from *von Raab*," and would enable the Court "to consider a wider range of issues than [would] be presented if it consider[ed] *von Raab* alone." *Burnley v. Railway Labor Executives' Association*, No. 87-1555, Petition for Certiorari at 17, 19 (cert. granted June 6, 1988). The Solicitor General's observation is even more true of this case, which will present the Court with factual circumstances in which the individuals tested do nothing to set themselves apart from their fellow employees, either by involvement in an accident or by seeking another job in the Customs Service, and in which the government's rationale for testing is entirely unrelated to tangible and demonstrable concerns about the protection of public safety or the prevention of drug smuggling.

This case deserves immediate consideration because of the imminent implementation of government-wide random testing under Executive Order 12,564. Until May 1988, when the Administration certified its program to Congress, drug testing had only been permitted in a few federal departments and agencies. Now, however, drug

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[22] Most federal agencies can be expected to defend drug testing not as a response to any specific drug problem, but as a generalized deferrence measure.

testing in the federal government and judicial challenges to it will proliferate. Sixty-day advance notices of testing began to issue in June and are currently being distributed, agency by agency. These notices have spawned several lawsuits in recent weeks,[23] and many more such lawsuits can be anticipated as additional agencies move toward implementation. It would be anomalous to have this random testing program go forward in some agencies, perhaps for years, until its constitutionality is finally determined in this Court, while it is enjoined elsewhere. Hundreds of thousands of federal employees—who face dismissal from employment if they assert their constitutional rights and refuse to urinate under surveillance and submit their urine to the government's fishing expedition for evidence of drug use—deserve prompt and authoritative guidance as to their rights.[24]

Granting review at this time will not deprive the Court of "the substantial value inherent in an intermediate consideration of the issue by the Court of Appeals." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937, 938 (1952) (Burton, J., dissenting from grant of certiorari before judgment). As noted above, there are already numerous appellate and trial court decisions concerning random testing, and there are likely to be more

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[23] In addition to this case, *see, e.g., American Federation of State, County & Municipal Employees, Local 3097 v. Meese*, No. 88-1875 (D.D.C.) (Department of Justice; complaint filed July 8, 1988); *AFGE v. Turnage*, No. C-88-20357 WAI (N.D. Cal.) (Veterans Administration; motion for preliminary injunction filed June 23, 1988); *Hansen v. Turnage*, No. C-88-20361 RPA, —— F. Supp. ——, (N.D. Cal. July 28, 1988) (Veterans Administration; preliminary injunction granted); *Quadros v. Reagan*, Case No. C-88-1764 RHS, —— F. Supp. —— (N.D. Cal. Aug. 12, 1988) (Weather Service; preliminary injunction granted).

[24] *Cf. United States v. Mistretta*, No. 87-1904, *cert. granted*, 108 S.Ct. 2894 (1988) (granting certiorari before judgment to resolve constitutionality of federal criminal sentencing guidelines where many lower court cases were pending and lower courts were divided).

in the next few months.[25] Thus, the Court will have the benefit of the views of other courts while it is considering this case. In any event, the Court will already be considering closely related issues in *Burnley* and *von Raab*; thus, the addition of this case to the docket cannot detract from the quality of the Court's deliberations on the subject of compulsory drug testing but can broaden and potentially improve it. Because the Court's decisions in *Burnley* and *von Raab* may very well not resolve the constitutionality *vel non* of random testing for the broad range of employees covered by Executive Order 12,564, because that question will ultimately have to be resolved in this Court, because the many lower courts that will first have to address the constitutionality of drug testing under Executive Order 12,564 would find this court's resolution of a case squarely involving that order invaluable, and because hundreds of thousands of federal employees should not be left at risk of losing either their livelihood or their constitutional rights while awaiting resolution of that issue, the Court should agree to hear this case now.

* * * *

This case can practicably be considered together with the *von Raab* and *Burnley* cases. Petitioners are aware that those cases have been scheduled for argument on November 2, 1988. In the event that this petition is granted, petitioners are prepared to file their briefs in accordance with whatever schedule suits the Court's convenience.

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[25] For example, two other cases addressing the constitutionality of federal employee random drug testing programs are now scheduled for argument in the District of Columbia Circuit on October 18, 1988. *NFFE v. Carlucci*, No. 88-5080 (testing of civilian employees in the Department of Defense) and *AFGE v. Dole*, No. 87-5417 (testing of employees in the Department of Transportation).

CONCLUSION

For the reasons presented above, the petition for a writ of certiorari before judgment should be granted.

Respectfully submitted,

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